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In the Supreme Court of the United States

OCTOBER TERM, 1982

FORT PIERCE UTILITIES AUTHORITY, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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Petitioners contend that the court of appeals erred in denying a motion to vacate its judgment as moot following settlement of the dispute underlying the judgment, where the settlement was entered into with the approval of the Commission before the time for seeking review of the judgment had expired.

1. In November 1979, the Federal Energy Regulatory Commission ordered Florida Power & Light Company (FP&L) to file a tariff setting forth FP&L's policy regarding the availability of electric transmission service to certain Florida municipal utilities (Pet. App. A-1 to A-9). Following the Commission's denial of FP&L's application for rehearing (Pet.

App. A-10 to A-12), FP&L sought review of the Commission's order in the court of appeals. The court reversed the Commission (Pet. App. A-24 to A-45; 660 F.2d 668), concluding that the Commission lacked authority to order FP&L to file the tariff containing the policy statement. The mandate of the court of appeals was issued on February 3, 1982 (Pet. App. A-54).

In March 1982, FP&L and petitioners entered into a comprehensive settlement of their legal differences (Pet. App. A-79). This settlement was reached after the court of appeals' decision reversing the Commission's order, but before expiration of the time for filing a petition for a writ of certiorari with this Court to review that decision. Part of the settlement was an agreement to seek, with the consent of the Commission, vacation of the judgment of the court of appeals on the ground that the controversy was moot (*id.* at A-60).

FP&L and petitioners subsequently entered into negotiations with the Commission's staff, which culminated in an uncontested settlement agreement. This agreement was approved by the Commission in June 1982 (Pet. App. A-76 to A-81). The Commission noted that "if the Commission approves the Revised Offer of Settlement, FP&L will undertake to file with the Former Fifth Circuit a motion to vacate its judgment in *Florida Power & Light Company* v. *F.E.R.C.*, 660 F.2d 668 (5th Cir., 1981), on the ground that the underlying controversy is moot" (Pet. App. A-80). In addition, the Commission recognized the need to act on the settlement before the expiration of the time for filing a petition for a writ of certiorari (*id.* at A-79).

On June 17, 1982, prior to the expiration of the time for filing a petition for a writ of certiorari to

review the decision of the court of appeals, FP&L and petitioners filed a motion requesting the court of appeals to vacate its judgment. The Commission took no position on the motion. However, it filed the following statement with the court (Pet. App. A-82):

> The Federal Energy Regulatory Commission agrees with the Florida Power & Light Company and Florida Cities, Intervenors, that the underlying controversy in these dockets is moot.

The court of appeals denied the motion to vacate without explanation (*id.* at A-88).

2. This Court has stated that "'[w]here it appears upon appeal that the controversy has become entirely moot, it is the *duty* of the appellate court to set aside the decree below and to remand the cause with directions to dismiss.'" *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979), quoting *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936) (emphasis added by the Court). The decision in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (footnote omitted), similarly makes clear that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." This practice serves "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 41.

Here, however, the motion to vacate judgment on mootness grounds was filed with the court of appeals after that court had issued its mandate. In these circumstances, it is questionable whether the court below was under any obligation to recall its mandate in

order to act favorably on the motion to vacate. Although the Commission, consistent with its stance in the court of appeals, takes no position with respect to the proper disposition of the petition for a writ of certiorari, the Solicitor General does not believe that this case presents any issue warranting the exercise of this Court's certiorari jurisdiction.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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